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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ALVARO CASTELLON, Plaintiff and Respondent, v. SAN FERNANDO POLICE OFFICERS ASSOCIATION, Defendant and Appellant.	B285980 Los Angeles County Super. Ct. No. BC656607

APPEAL from an order of the Superior Court of Los Angeles County, Rafael A. Ongkeko, Judge. Affirmed in part; reversed in part.

Rains Lucia Stern St. Phalle & Silver, Brian P. Ross and Christopher D. Nissen for Defendant and Appellant.

Lazarski Law Practice and Bryan J. Lazarski for Plaintiff and Respondent.

INTRODUCTION

Code of Civil Procedure section 425.16[1] (anti-SLAPP statute) provides a mechanism to resolve, at an early stage of litigation, lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. The anti-SLAPP statute allows a defendant to bring a special motion to strike a claim, or portions of a claim, targeted at protected speech or conduct. Once the defendant shows its actions are protected under the anti-SLAPP statute, the plaintiff must then produce prima facie evidence supporting its claim, i.e., must demonstrate a reasonable probability of success. If the plaintiff fails to do so, the claim will be dismissed.

San Fernando Police Officers Association (Association) appeals the trial court's order denying its special motion to strike the complaint brought by plaintiff Alvaro Castellon, a former police officer and former member of the Association. Castellon sued the Association after it produced and mailed a two-sided flyer to residents of the City of San Fernando (City) in advance of a local election. The flyer called out Castellon by name and either directly stated or insinuated that he had previously committed a number of misdeeds in coordination with the prior mayor of the City, who was purportedly recalled by an overwhelming majority of the City's residents.

The court found the conduct at issue—mailing election-related flyers to voters in the City—was plainly protected under the anti-SLAPP statute because the alleged misconduct related to matters of public interest or concern. But the court concluded

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[1] All undesignated statutory references are to the Code of Civil Procedure.

Castellon established that his claims against the Association—defamation, false light, and intentional infliction of emotional distress—have the minimal merit required to survive an anti-SLAPP motion. We agree and affirm the order to the extent the claims relate to the two-sided flyer attached to the operative complaint as Exhibit B.

We reverse the order to the extent the claims are based on the single-sided flyer attached to the complaint as Exhibit A. The Association's president denied that the Association had any role in creating or distributing that flyer and Castellon produced no contrary evidence. Accordingly, he failed to establish any possibility he would prevail on the claims predicated on Exhibit A.

FACTS AND PROCEDURAL BACKGROUND

1. General Background

1.1. The Parties

According to the operative complaint, Castellon is a resident of the City of San Fernando (the City). He worked as a police officer for the City for more than 10 years and voluntarily resigned from the City's employ in August 2013. While employed as a police officer, Castellon was a member of the Association, which is a labor union that represents police officers employed by the City.

1.2. The Association's Election Flyer

The City held an election in March 2017. Prior to the election, the Association mailed a two-sided flyer (the flyer) in

support of the incumbent mayor to residents of the City.[2] The flyer targeted an organization called " 'Residents for a Better San Fernando.' " Several statements contained in the flyer form the basis of Castellon's subsequent action against the Association.[3]

The front of the flyer includes a photograph of three shadowy figures standing together and wearing plain white masks. The text superimposed over the figures reads: "Who's Really Behind the Mask?" and "Who's Really Behind the So-Called 'Residents for a Better San Fernando' Committee?"

In the lower corner of the front page, a small portion of what appears to be a newspaper is revealed and snippets of text are visible: "Sex Scandal," "BANKRUPTCY?" "[R]ECORD VOTE," and "MAYOR RECAL[LED]." The top of the front page states the message was paid for by the Association.

The back of the flyer shows a broken white mask and states at the top, "The Culprits UNMASKED!" It then lists: "Former Disgraced, Recalled Mayor Brenda Esqueda," "Her Disgraced Boyfriend Former Police Sergeant Al Castellon," "And others who supported their corrupt administration."

The flyer continues with two paragraphs of text:

"The *same depraved individuals* that were removed from office, involved in a sex scandal, attempted to eliminate local fire and police services and who brought our city to the brink of bankruptcy are behind the So-Called 'Residents for a Better San Fernando' Committee!"

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[2] The flyer was attached to the operative complaint as Exhibit B.

[3] The complaint alleges the Association also produced and distributed a single-sided flyer attached to the operative complaint as Exhibit A, which we address briefly at the end of this opinion.

"THEY'RE BACK FOR REVENGE! After a historic 69% of San Fernando voters came to the polls—with 85% voting to recall Esqueda and her henchmen—they want to return to power to punish those that opposed them."

The bottom of the page contains an image of what appears to be an election flyer by Residents for a Better San Fernando. Superimposed on top of the image in large, bold-face type, is the phrase "DON'T BELIEVE THE LIES."

The flyer goes on: "DON'T FALL FOR THEIR LIES! The So-Called 'Residents for a Better San Fernando' Committee CAN'T BE TRUSTED!"

The flyer concludes: "Join the San Fernando Police Officers Association in Supporting the Candidates that Have Earned Our Trust, that Serve with Honor and Integrity, and Will Make Public Safety Their Priority: Re-Elect Mayor Robert Gonzales[,] Vice Mayor Joel Fajardo[,] Tuesday, March 7, 2017[.]"

2. The Complaint

In April 2017, Castellon filed the present action against the Association, asserting claims for defamation per se, false light, and intentional infliction of emotional distress. The operative first amended complaint attached a copy of the flyer.

The operative complaint alleged that Castellon was a private figure who was uninvolved in the election. According to the complaint, Castellon never participated in any local political action committee including "the so-called 'Residents for a Better San Fernando.' "

The complaint identified several objectionable statements in the flyer:

- Castellon was a member of Residents for a Better San Fernando;
- Castellon was "disgraced," "corrupt," and "depraved;"
- Castellon brought the City "to the brink of bankruptcy;"
- Castellon sought "revenge" and sought to "punish those who opposed him."

The complaint alleged that each of these statements was defamatory and made with knowledge of its falsity or without regard for its truth.

3. The Anti-SLAPP Motion

3.1. The Association's Motion

The Association filed a motion to strike portions of the complaint as well as a special motion to strike the complaint under the anti-SLAPP statute.

With respect to the first prong of the anti-SLAPP analysis, the Association argued the flyer contained statements made in the context of an election which are protected under the anti-SLAPP statute as statements made in a public forum about a matter of public interest (§ 425.16, subd. (e)(3)) or as statements made in connection with a public issue or an issue of public interest (§ 425.16, subd. (e)(4)). Specifically, the Association noted the statements were made in a public forum—the complaint alleged the flyer was mailed to residents throughout the City—

and related to an upcoming local election—plainly a matter of public interest.

With respect to the second prong of the analysis, the Association contended Castellon would not be able to prevail on his claims. As an initial matter, the Association argued Castellon was a public figure because he worked for the City as a police officer for 11 years. As such, he would be required to meet a heightened standard of proof on his claim for defamation, i.e., he must demonstrate by clear and convincing evidence that the Association acted with actual malice.

On the merits, the Association observed that in order to prove a defamation claim, a plaintiff must identify statements that are " 'false and unprivileged.' " Here, the Association argued, the statements identified in the complaint were opinions (rather than provably false statements of fact) that are constitutionally protected. Additionally, the statements could not reasonably be construed as statements of fact because they were made in the context of an election where rhetoric, hyperbole, and distortion are commonplace. The Association also parsed the specific statements identified in the complaint and claimed none of the statements could reasonably be construed as targeted at Castellon, who never held political office. Instead, according to the Association, the statements were directed solely at the former mayor and "her henchmen."

In support of the anti-SLAPP motion, the Association submitted a declaration by its president. He stated the Association was involved in the preparation and distribution of the flyer for the purpose of supporting two city council candidates and "to inform potential voters about [the Association]'s opinions of the political action group Residents for a Better San Fernando

which has political views which are starkly in contrast with the interests of [the Association]."

3.2. Castellon's Opposition

In opposition to the Association's anti-SLAPP motion, Castellon contended the statements identified in the complaint were facts rather than non-actionable opinions. Further, he asserted the Association's speech could not reasonably be considered political rhetoric or hyperbole because he was neither a political candidate nor a public figure. Accordingly, the protection traditionally afforded politically-motivated speech should not apply in this case. Castellon also argued that as a retired police officer, he did not qualify as a public figure or public official and was therefore not required to prove actual malice on the part of the Association.

In support of his opposition, Castellon submitted a declaration in which he stated that he voluntarily resigned from his employment with the City in August 2013 in order to pursue other business interests. And because he was a member of the Association during his employment, Castellon posited that the Association knew or should have known that he voluntarily resigned from his employment—as opposed to being involuntarily terminated. Further, Castellon declared that he was never involved in any political activity in support of or in opposition to any candidate for public office in the City during the March 2017 election, and did nothing to thrust himself into the public forum with respect to the March 2017 election. In addition, he denied the truth of each of the allegedly defamatory statements identified in the complaint.

4. The Court's Ruling and the Appeal

The court denied the Association's motion to strike and its anti-SLAPP motion. The court noted the flyer was distributed in the course of an election and therefore fell within the scope of the anti-SLAPP statute because it contained statements made in a public forum relating to a public issue.

As to the second prong—the probability of success on the merits—the court concluded Castellon met his burden. With respect to the defamation and false light claims, the court examined the flyer as a whole and found that it depicted Castellon as a key member of Residents for a Better San Fernando and implied that he was one of the "depraved individuals" that previously sought to eliminate important city services and, together with the former mayor, engaged in corruption and other misdeeds. The court rejected the Association's contention that the statements were political rhetoric, noting that Castellon was not a candidate in the election. In addition, the court noted that as a retired police officer, Castellon did not meet the definition of a "public official" who must show, in a defamation action, that false statements were made with actual malice. The court made similar findings relating to the claim for intentional infliction of emotional distress.

The Association timely appeals.

DISCUSSION

The Association contends the court erred in denying its anti-SLAPP motion because Castellon failed to demonstrate that his claims for defamation, false light, and intentional infliction of emotional distress have the minimal merit required to survive an

anti-SLAPP motion. We disagree to the extent Castellon's claims are based on the two-sided flyer.

1. Standard of Review

In an appeal from an order granting or denying a motion to strike under section 425.16, the standard of review is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) In considering the pleadings and supporting and opposing declarations, we do not make credibility determinations or compare the weight of the evidence. Instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Ibid.*)

2. Legal Principles Regarding the Anti-SLAPP Statute

"A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

Our Supreme Court has clarified the scope of the anti-SLAPP statute: "The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the

burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [The Supreme Court has] described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–385, fn. omitted (*Baral*).)

3. The court properly denied the Association's special motion to strike the operative complaint as to all claims predicated on the two-sided flyer.

3.1. First prong: The conduct at issue—preparing and mailing flyers about a local election to City residents—is activity protected under the anti-SLAPP statute.

Section 425.16 provides that an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the

public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

Here, it is undisputed that the Association prepared and mailed the two-sided flyer relating to an upcoming local election to residents of the City. And it is well established that statements relating to elections and political issues are protected by the anti-SLAPP statute. Indeed, "[t]he right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. 'Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment.' [Citation.]" (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548; *Major v. Silna* (2005) 134 Cal.App.4th 1485, 1490–1491.) As Castellon does not dispute the point, we proceed with our analysis on the second prong.

3.2. Second prong: Castellon established a probability of prevailing on the defamation and false light claims.

Under the second prong of the section 425.16 analysis, Castellon must demonstrate a probability of prevailing on his claims for defamation and false light. We conclude, as the trial court did, that he met this burden.

" 'The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.' " (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1312 (*John*

Doe 2).) " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' [Citation.] … ' "A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim … ." ' [Citations.] Indeed, '[w]hen a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action.' [Citation.]" (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.)

The Association claims the statements identified in the complaint are not actionable because they are statements of opinion and/or political rhetoric rather than assertions of fact. In the alternative, the Association argues that even if the statements are actionable, Castellon is a public figure who must establish that the Association acted with actual malice. Finally, even if Castellon is not a public figure, the Association urges that he has not shown the Association acted recklessly or negligently with respect to the truth of the statements identified in the complaint.

3.2.1. The objected-to statements could reasonably be construed as factual statements rather than opinions.

The Association argues Castellon cannot succeed on the second element of his defamation claim—falsity—because the offending statements are not assertions of fact that can be proven false, but rather are matters of opinion that are not subject to

liability for defamation. And the Association emphasizes that our courts have been especially lenient about what constitutes an opinion (as opposed to an assertion of fact) in the context of politics and elections.

As the Association notes, California courts have repeatedly held that statements of opinion are protected by the First Amendment. Thus, to be actionable, an allegedly defamatory statement must make an assertion of fact that is provably false. " 'The question is whether the statement is provably false in a court of law.' " (*John Doe 2, supra*, 1 Cal.App.5th at p. 1313.) "[I]t is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a provably false assertion of actual fact. If that question is answered in the affirmative, the jury may be called upon to determine whether such an interpretation was in fact conveyed." (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608; *John Doe 2,* at p. 1312.)

As our Supreme Court has noted, the critical distinction between "whether the allegedly defamatory statement constitutes fact or opinion is ... frequently a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." (*Gregory v. McDonnell Douglas* (1976) 17 Cal.3d 596, 601.) But

"[t]hat does not mean that statements of opinion enjoy blanket protection. [Citation.] To the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. [Citation.] The critical question is not whether a statement is fact or opinion, but ' "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact." ' [Citation.]" (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 155–156 (*GetFugu*).)

The test, in California, to determine whether an allegedly defamatory statement is fact or opinion is a " ' "totality of the circumstances" ' " test. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 261; *GetFugu, supra*, 220 Cal.App.4th at p. 156.) Context is critical. "In determining whether statements are of a defamatory nature, and therefore actionable, ' "a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." That is to say, the publication is to be measured not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader.' " (*Morningstar, Inc. v. Superior Court* (1994) 23 Cal.App.4th 676, 688; *John Doe 2*, *supra*, 1 Cal.App.5th at p. 1312.)

The flyer at issue was, as noted, mailed to City residents in advance of a local election. The Association argues that each of the statements identified in the complaint, taken on its own, is innocuous, vague, not factual, and/or not directed at Castellon. We find the City's analysis unpersuasive and conclude a reasonable jury could find the statements identified by Castellon

to be statements of fact rather than opinions. We consider each statement in turn.

First, the flyer states Castellon was a member of Residents for a Better San Fernando. The Association asserts "it is entirely unclear how being a member of such an innocuously-named citizen group could cause any harm to [Castellon]'s reputation." But the Association did not depict Residents for a Better San Fernando as innocuous. Far from it. The flyer expressly states the group is comprised of "[t]he *same depraved individuals* that were removed from office, involved in a sex scandal, [who] attempted to eliminate local fire and police services and who brought our city to the brink of bankruptcy" and further states those individuals "want to return to power to punish those that opposed them." And those words coupled with the images on the first page of the flyer imply that the members of Residents for a Better San Fernando are corrupt former City officials attempting to regain power in the City while concealing their identities, presumably because they have reason to believe they (or their candidates) would not be elected if their true identities were known to the public. Contrary to the Association's argument, these statements (and the inferences drawn from them) can reasonably be viewed as factual assertions that reflect negatively on Castellon.

Second, the flyer characterized Castellon as "disgraced," " 'corrupt,' " and "depraved." In response, the Association asserts the descriptors " 'corrupt' " and "depraved" were intended to refer only to the former mayor and her administration and are, in any event, matters of opinion. Specifically, the Association claims the flyer refers to "a 'corrupt administration.' " It doesn't. The flyer identifies the mayor, then Castellon, and then "others who

supported *their* corrupt administration." A reasonable interpretation of that statement—particularly the use of the term "their"—is that Castellon was part of the prior administration and he, as an identified member of the administration, was corrupt. And the assertion that a public official is corrupt—i.e., that he has used the power of his public office or employment for personal gain—is a factual statement capable of being disproved. The terms "depraved" and "disgraced" are more nuanced and generally more suggestive of opinion rather than fact. But taken in context, those terms imply that Castellon was either removed from office or was dismissed from the police force due to his corrupt actions and/or involvement in a sex scandal with the former mayor. Again, these statements are reasonably viewed as factual assertions rather than simply opinions.

Third, as to whether the flyer implies that Castellon brought the City "to the brink of bankruptcy," the Association argues the flyer doesn't specifically state Castellon personally brought the City to the brink of bankruptcy. But as noted above, the flyer implies that Castellon was part of the prior administration and a reasonable reader could, therefore, conclude that he was responsible, in whole or in part, for that administration's actions. The Association also asserts the phrase "brink of bankruptcy" is too vague to constitute defamation and cites *James v. San Jose Mercury News, Inc.* (1993) 17 Cal.App.4th 1 as directly on point. There, the Court of Appeal considered numerous statements published in a newspaper article relating to a defense attorney's improper procurement of school records for a minor who claimed to have been victimized by the attorney's client. The court concluded some of the statements—" 'when the legal community turns on kids, it doubles their trauma,' " a

school employee " ' "get[s] hassled all the time by attorneys wanting school records without going through the proper motions," ' " and the fact that proceedings against the attorney were pending meant " 'the judge has taken a dim view of the defense tactics' "—were not truly susceptible to proof or disproof because they were too general, too subjective, and used "elastic terms." (*Id*. at p. 15.)

While we agree that the term "brink of bankruptcy" defies an exact definition, the overall implication of the statement is factual and capable of being proven or disproven. Specifically, by accusing Castellon of taking the City "to the brink of bankruptcy," the Association impliedly asserts that he substantially and negatively mismanaged the City's finances. And although the precise degree of that mismanagement is left somewhat ambiguous, that is beside the point in this instance, where Castellon never had *any* control over the City's finances.

Finally, the complaint identifies the flyer's statements that Castellon sought "revenge" and sought to "punish those who opposed him." Again, context is critical. The overall message of the flyer is that the former mayor and Castellon are attempting to reclaim power in the City and continue their corrupt prior practices. That overall message—comprised of several smaller assertions and ample innuendo—is the focus of the defamation and false light claims. Taken together, a reasonable juror could find these statements to be assertions of fact rather than non-actionable opinion.

The Association repeatedly asserts that because the offending statements were made in the context of an election, they cannot reasonably be understood as facts and instead fall into the category of political rhetoric. Our courts have, as the

Association observes, consistently held that "[t]he First Amendment precludes a defamation action merely based upon an unfavorable characterization of a political opponent during an election campaign." (*Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1047; and see *Desert Sun Publishing Co. v. Superior Court* (1979) 97 Cal.App.3d 49, 51 ["It is an essential part of our national heritage that an irresponsible slob can stand on a street corner and, with impunity, heap invective on all of us in public office."].) But as the Association itself observes, these cases, and others, focus on the need for public discourse about political *candidates* or those who hold public office: " 'The right to speak on political matters is the quintessential subject of our constitutional protections of the right of free speech. "Public discussion about the qualifications of those who hold or who wish to hold positions of public trust presents the strongest possible case for applications of the safeguards afforded by the First Amendment." ' [Citation.]" (*Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446,1451.) And by seeking public office, a candidate "invites public criticism of his fitness and qualifications … ." (*Id.* at p. 1454.)

Here, however, Castellon was not a candidate for any public office in the election at issue nor was he involved in any political activity in support of or in opposition to any candidate in the race. It would appear, then, that the protection afforded to political rhetoric should not apply to statements relating to Castellon. But the Association claims, without citation to either the appellate record or a single case, that because Castellon never denied that he is (or was) the former mayor's boyfriend, the use of strong language about him is immune from liability. We reject this argument both because of its sweeping breadth and

the absence of any factual or legal support. (See, e.g., *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 779–801 [several contentions on appeal "forfeited" because appellant failed to provide a single record citation demonstrating it raised those contentions at trial]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699–700 [issue not supported by pertinent or cognizable legal argument may be deemed abandoned].)

3.2.2. Castellon is not required to establish the Association acted with actual malice.

The Association also contends that even if the offending statements can reasonably be construed as facts rather than non-actionable opinions, Castellon must meet the higher standard of proof required of public figures asserting defamation claims, i.e., he must demonstrate by clear and convincing evidence that the Association made the statements with actual malice, that is, with knowledge of their falsity or with reckless disregard for their truth. (See *New York Times Co. v. Sullivan* (1964) 376 U.S. 254.) According to the Association, Castellon qualifies as a public figure because he was once a police officer. (See *Gomes v. Fried* (1982) 136 Cal.App.3d 924, 932–934 [holding police officer was a " 'public official' " because "[t]he *abuse of a patrolman's office can have a great potentiality for social harm*; hence, public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under State libel laws"].)

Castellon offers two responses. First, it is undisputed that Castellon left his employment as a police officer several years prior to the election and therefore was not a police officer at the time the Association circulated the flyer. The trial court found

this point persuasive, finding that the need for open public discussion about police officers' performance and qualifications ends once a person is no longer a police officer.

Castellon's second response is more to the point. Not all of the statements identified relate to Castellon's performance as a police officer, as we have already noted. And even as to those statements that could relate to actions allegedly taken when Castellon was a police officer, the focus of the speech is *the election*. In other words, the flyer is attempting to persuade City residents to vote for particular mayoral and vice-mayoral candidates—it is not an invitation to discuss accountability of the City's police force. For that reason, we conclude Castellon is not a public figure with respect to the statements contained in the two-sided flyer.

3.3. Second prong: Castellon established a probability of prevailing on the claim for intentional infliction of emotional distress.

To prevail on a claim for intentional infliction of emotional distress, a plaintiff must demonstrate: " ' " '(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. ...' " ' " (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001; *Hughes v. Pair* (2009) 46 Cal.4th 1035,1050.) " ' "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." ' " (*Potter*, at p. 1001.) However, "liability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,' but

only to conduct so extreme and outrageous 'as to go beyond all possible [bounds] of decency ... .' " (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 499, fn. 5; *Hughes*, at p. 1051.)

Castellon's declaration plainly states that he was not involved in any way with either Residents for a Better San Fernando or with the election generally. Nevertheless, the Association identified him by name in an election-related flyer and distributed that flyer to residents of the City—the community in which Castellon had worked as a police officer for more than 10 years. And as we have explained, the flyer contains multiple allegations of misconduct about Castellon, including corruption and involvement in a sex scandal.

The trial court concluded that "[b]ringing a private citizen into an election debate and then subjecting that private individual to the statements contained in the mailer is outrageous and beyond the bounds of tolerable behavior. By publishing the flyers, [the Association] acted with reckless disregard that [Castellon] would suffer emotional distress as a result of such conduct." We agree and conclude Castellon has established the minimal merit required to survive the Association's anti-SLAPP motion.

The Association argues that because the defamation claim fails and the intentional infliction of emotional distress claim is based on the same conduct, the emotional distress claim must fail as a matter of course. Given that we have allowed the defamation claim to proceed, we reject this argument.

In addition, the Association urges that Castellon failed to provide any evidence that the Association acted intentionally or recklessly. On this point, we agree with the trial court. A reasonable jury could conclude that the Association acted, at a

minimum, recklessly by specifically identifying Castellon on the election-related flyer—even though he was a private citizen not involved in the election in any way—then characterizing him as corrupt, disgraced, and depraved, and implying that he committed a variety of misdeeds in concert with the prior mayor who had been overwhelmingly recalled by the residents of the City.

Finally, citing *Comstock v. Aber* (2012) 212 Cal.App.4th 931 (*Comstock*), the Association claims Castellon failed to produce any evidence indicating that he has suffered severe emotional distress. *Comstock* is distinguishable. There, plaintiff Aber sued various defendants (her employer and several employees) alleging she had been the victim of a sexual assault by employee Comstock. (*Id.* at p. 935.) Comstock filed a cross-complaint alleging, among other claims, intentional infliction of emotional distress resulting from Aber's reporting of the alleged assault to a nurse and an employee in the human resources department. (*Ibid.*) Aber filed a special motion to strike the cross-complaint under the anti-SLAPP statute, which motion the court granted.

In evaluating whether Comstock established a probability of success on his emotional distress claim, the appellate court focused mainly on the fact that the conduct alleged—Aber's reports of the alleged assault to a nurse and a human resources employee—was not " 'extreme and outrageous,' " as is required to establish the first element of a claim for intentional infliction of emotional distress. (*Comstock, supra*, 212 Cal.App.4th at p. 954.) The court then stated, "Beyond that, Comstock has provided no evidence that he suffered any emotional distress, let alone severe distress." (*Ibid.*) The Association quotes this statement in support

of its contention that Castellon failed to produce any evidence that he suffered severe emotional distress.

Importantly, however, neither Comstock's cross-complaint nor Comstock's declaration alleged Comstock suffered any injury as a result of Aber's reports of the alleged assault. (*Comstock, supra*, 212 Cal.App.4th at pp. 935–938.) Here, by contrast, Castellon alleged that he has suffered "humiliation, mental anguish, and emotional and physical distress." And in his declaration, Castellon asserts he has "suffered damages to [his] reputation in [his] community, both actual and presumed … ." At this early stage, it is not unreasonable to infer that a former police officer accused of substantial misconduct in a flyer mailed to the residents of the community which he formerly served would suffer severe emotional distress as a result.

4. The court erred in denying the anti-SLAPP motion to the extent it related to the single-sided flyer.

As noted, the complaint also contained allegations relating to a single-sided flyer that was attached to the complaint as Exhibit A (Exhibit A). In support of its anti-SLAPP motion, the Association submitted a declaration by its president stating, "Neither [the Association] nor its agents prepared or distributed, in any way, the flyer attached to the Complaint as Exhibit A. I do not have any personal knowledge with respect to who did prepare or distribute this flyer except that I know that [the Association] was not involved." The Association requested that the court grant the special motion to strike on all claims to the extent they related to Exhibit A because Castellon could not attribute the statements contained in that document to the Association. Castellon produced no contrary evidence and focused mainly on the statements contained in the two-sided flyer, as discussed

above. The trial court did not address the Association's argument that the motion should be granted to the extent the claims were based on the statements contained in Exhibit A.

In *Baral*, our Supreme Court clarified that a defendant bringing an anti-SLAPP motion may move to strike an entire complaint or, "like a conventional motion to strike, may … attack parts of a count as pleaded." (*Baral, supra,* 1 Cal.5th at p. 393–394.) Here, the Association did just that and produced undisputed evidence supporting a complete defense to Castellon's claims as they relate to Exhibit A. By failing to come forward with any opposing evidence suggesting the statements in Exhibit A could be attributed to the Association, Castellon failed to demonstrate any possibility of success on those claims. The court erred in not granting the anti-SLAPP motion in part and we must therefore reverse the order on that issue.

DISPOSITION

The order denying the Association's anti-SLAPP motion is reversed to the extent it relates to the claims predicated on Exhibit A. Upon remand, the court is directed to enter a new order granting the anti-SLAPP motion in part, as it relates to Exhibit A. The order is affirmed in all other respects. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.